

OPEN LETTER

To : Freedom of Information Team, Department of Health and Social Care

cc : Information Commissioner's Office

Date: 27 July 2023

Your Reference: COMDE-1461159

Dear Sir or Madam

COMPLAINT : Mishandling of Fol requests :-

- Knowingly withholding requested information**
- Knowingly making untruthful statements to Fol Requestor**
- Alleged Offence under section 77(1) of Fol Act 2000**

Thank you for your recent letters:

- Dated 18 July 2023, from Mr [REDACTED], Reference COMDE-1461159
- Dated 18 July 2023, from Mr [REDACTED], Reference FOI-1440903
 - With associated e-mail chain between DHSC and PHE personnel

And previous letters:

- Dated 27 October 2022, from [REDACTED], Reference IR-1420534
- Dated 5 August 2022, from (unsigned, DHSC Fol Team), Reference Fol-1326888
- Dated 28 April 2021, from Ms [REDACTED], Reference, Fol-1319111

I refer also to my open letter to you dated 4 October 2022 and the 9 further items of correspondence relating to this Fol listed in the annex to this letter, dating back to the initial Fol request 29 March 2021.

I should clarify that despite the above-mentioned letter being headed "Open Letter", and this letter being similarly headed, it is not my immediate intention to put this correspondence into the public domain, although that possibility cannot be ruled out at some stage in the future. I should make you aware of the possibility that I make all the correspondence in this matter available to the UK Covid-19 Public Inquiry and the Scottish Covid-19 Inquiry.

You will note that I am copying this correspondence to the Information Commissioner's Office. For the avoidance of doubt I am not raising a formal complaint with them (but would do if so requested). My purpose in copying to them is because there is a prima-facie case that an offence has been committed by persons within the Department of Health and Social Care (DHSC) which they may wish to investigate. Specifically I refer to the concealing of a record held by a public authority, with the intention of preventing the disclosure by that authority of the information to the communication of which I am entitled as an applicant – wording which you may recognise from section 77(1) of the Act.

Although not an offence under the Act per se, the ICO may consider it unreasonable that an Fol applicant should, after 27 months, still not have received a copy of the document which he is seeking, taking account of the fact that the document was in DHSC's possession right from the start.

The ICO may also find it relevant that the Office of the Chief Medical Officer and Deputy Chief Medical Officer were closely involved with the matter, right from the start, provided the requested document to the DHSC Fol team but with the proviso that they wished to have sight of the reply before it was sent out. As it happens, no reply was ever sent out (*at least no reply which enclosed the requested document*) and the ICO may wish to enquire as to whether those senior members of the Department played any role in that.

Having just spoken with a member of the ICO team they advise that I progress my complaint through stage 2 and, if necessary, stage 3 and then take it from there. Meanwhile they will keep any correspondence between us on file for possible future reference. I am happy with that approach. Please would you therefore copy them in any further correspondence at icocasework@ico.org.uk.

In order for anyone reading this letter who is unfamiliar with this case, they should first read my letter to DHSC dated 4 October 2022, then revert to this letter.

The FoI under consideration requested 4 documents. Documents #1, #3 and #4 related to various editions of the IPC guidance. Document #2 (otherwise referred to as “Q2” in the attached e-mail chain) was the version of IPC guidance sent by Prof Sir J Van-Tam to NHS on 12 Mar 2020. The importance and significance of this document has been explained in my letter 4 October 2022 (i.e. downgrading PPE requirements despite the disease still being classified an Airborne High Consequence Infectious Disease – for which proper respiratory protection is required).

For the avoidance of doubt, I am no longer interested in documents #1, #3, #4 which are in the public domain. However I still require to have a copy of document #2 which has for so long been denied to me by virtue of false and misleading statements.

You will see in the attached PDF of the email chain I have highlighted in pale yellow, all references to this document being discussed or attached to onward emails. It will be seen that:

- Document #2 was provided to the DHSC FoI team by the CMO/DCMO's office and was attached to the email sent 11 May 2021 at 14:13. The sender of the email requested sight of the reply before it was sent out (See further references to this highlighted in mauve text 27-28 May. As it happens, no reply was ever sent out – at least not with document #2 being attached).
- It was clear from the email on 12 May 2021 21:30 that there were “sensitivities” associated with disclosing document #2
- On 13 May 2021 09:10 the writer suggested that document #2 “probably shouldn’t be released” (as indeed it wasn’t).
- This caused some consternation to the sender of the email 17 May 2021 20:56 who clearly didn’t know how they were going to handle document #2 that they knew they held.
- On 17 May 2021 21:15 a member of the PPE-Briefing Team received document #2 as an attachment
- On 29 June 2021 14:11 someone by the name of Bell [REDACTED] (partially redacted) and PPE-briefing were being engaged in a dilemma as to what to do about document #2 since they did hold it, should they disclose it, withhold it or partially disclose it? – again, ‘sensitivity’ being an issue.
- On 28 July 2021 10:13 the sender of an email confirmed that the request had started off with the CMO/DCMO's office being involved.
- On 21 September 16:56 document #2 was still “doing the rounds”, being attached to an email being sent to “PPE-briefing”.

I notice that, during the above process, there was some considerable debate as to whether the use of section 35 might be used (formulation of Government Policy being involved) and on 13 September 2021 16:35 there was mention of the ICO having sent an email to the effect that they did not want Government Departments to withhold information without a good justification for doing so and querying that the DHSC's use of section 35 was justified. Please would you (or the ICO's office) send me a copy of that email. Hopefully I shall not have to raise yet another FoI for that purpose.

Yours Sincerely

DFJ Osborn BSc CMIOSH SpDipEM



Chartered Safety and
Health Practitioner



(address and contact details provided on
accompanying e-mail)

ANNEX: Extracts from correspondence relating to this FoI request

29 March 2021 D.Osborn to DHSC Original FoI Submitted online	I request a copy of the guidance which was issued by Professor J Van-Tam to NHS on 12 March 2020 concerning Infection Prevention and Control. The specific document I am requesting is the one that is referred to in paragraph 2.3 of the minutes of the 9th meeting of the NERVTAG COVID-19 committee which was held by telecon on 13 March 2020 (attached)
28 Apr 2021 Reply from FoI Officer (████) to Ref FOI-1319111	DHSC holds the information you have requested. However, as this information is in the public domain, we will, under section 21 of the FOIA (information accessible to the applicant by other means), refer you to the published source. This information can be found at the following link: https://www.gov.uk/government/publications/wuhan-novel-coronavirus-infection-prevention-and-control <i>In other words they did not provide the specific document requested – just referred to the then current version</i>
29 Apr 2021 D. Osborn email to █████	Dear Ms █████ Thank you for your letter e-mailed to me yesterday. I am not satisfied with your response and wish to lodge an appeal. My interest is not in current IPC guidance to which you have referred me via the link in your letter. I am very familiar with these documents. I am also aware of the version history. I made it very clear by explicitly stating my request for the specific document referred to in paragraph 2.3 of the minutes of the 9th meeting of the NERVTAG COVID-19 committee which was held by telecon on 13 March 2020. To save you looking this up, it stated that "JVT commented that he has sent a revised version to the NHS yesterday as a matter of urgency". It is that "revised version" which I wish to see please, not the guidance as it is today. I am pleased to hear in your letter that you do hold this document and I request that you release it to me or, if you will not release it to me, give me the reason why you refuse. If that specific document is in the public domain (<i>which I very much doubt</i>) then please send me the link to it.
28 May 2021 Letter from FoI Officer (████) to D Osborn	Response from FoI Officer (████) – assigned new reference FOI-1326888:- Thank you for your request to the Department of Health and Social Care dated 29 April 2021 under the Freedom of Information Act (our ref: FOI-1326888). The Department holds relevant information. I am writing to inform you that the Department's consideration of the balance of the public interest with regards to your request is not yet complete, and requires further time to complete in line with Section 10(3) of the FOI Act. The Department is currently assessing the public interest in release under Section 35 of the FOI Act (policy in formulation). We anticipate this process will take no longer than a further 20 working days to complete. We therefore aim to respond fully to your request by 29 June 2021.
29 June 2021 Letter from FoI Officer (████) to D Osborn	Thank you for your request to the Department of Health and Social Care dated 29 April 2021 under the Freedom of Information Act (our ref: FOI-1326888). The Department holds relevant information. I am writing to inform you that the Department's consideration of the balance of the public interest with regards to your request is still not yet complete. <i>etc...</i>
27 July 2021 Letter from FoI Officer (████) to D Osborn	Thank you for your request to the Department of Health and Social Care dated 29 April 2021 under the Freedom of Information Act (our ref: FOI-1326888). The Department holds relevant information. I am writing to inform you that the Department's consideration of the balance of the public interest with regards to your request is still not yet complete. <i>etc...</i>
24 Aug 2021 Letter from FoI Officer (████) to D Osborn	Thank you for your request to the Department of Health and Social Care dated 29 April 2021 under the Freedom of Information Act (our ref: FOI-1326888). The Department holds relevant information. I am writing to inform you that the Department's consideration of the balance of the public interest with regards to your request is still not yet complete. <i>etc...</i>
22 Sep 2021 Letter from FoI Officer (████) to D Osborn	Thank you for your request to the Department of Health and Social Care dated 29 April 2021 under the Freedom of Information Act (our ref: FOI-1326888). The Department holds relevant information. I am writing to inform you that the Department's consideration of the balance of the public interest with regards to your request is still not yet complete. <i>etc...</i>
22 Sep 2021 Letter D Osborn to FoI Officer	Dear Ms █████ Do you realise how many times you have now sent me this same prevaricatory email ? I lodged my appeal in April and it is now 5 months later. This is unacceptable. I do not believe for one minute that my request for these documents cannot be "in the public interest". Please do not delay any further.
Nothing then heard for almost a year	
5 Aug 2022 Final letter from DHSC FoI Team	DHSC does not hold the information you have requested. However, you may wish to contact NHS England, which may hold information relevant to your request.
4 October 2022	Letter DO to FoI Team (a) requesting an internal review, pointing out that, on numerous occasions the Department had confirmed that it did hold the information and (b) raising a new FoI request for all correspondence within the Department relating to the handling of this FoI
27 October 2022	Letter █████ to D Osborn: Outcome of Internal review: the response on 5 Aug was compliant with the FOI Act. Also stating that the UK-HSA may be able to provide the JVT IPC guidance of 12 Mar 2020. By implication, therefore, █████ was concealing the fact that DHSC actually possessed this document itself
3 March 2023	Email from D Osborn raising formal complaint
18 July 2023	Letter from █████ to D Osborn – response to complaint (Stage 1 of DHSC Complaints process) Letter from █████ to D Osborn – response to FoI requesting internal DHSC correspondence concerning the handling of this FoI: Attached a PDF document containing the email chain between DHSC (& PHE) staff (redacted)
27 July 2023	D Osborn requests escalation to Stage 2 of the Department's complaints process, following discussion with ICO. (i.e. this letter)